Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	

COMMENTS OF UNITED UTILITIES, INC. COMMISSION RULES RELATING TO HIGH-COST UNIVERSAL SERVICE SUPPORT AND THE ETC DESIGNATION PROCESS

Steve Hamlen
President
United Utilities, Inc.
April 30, 2003

Executive Summary

United Utilities, Inc. (UUI), herein, requests that the Commission establish permissive guidelines that states could use to determine whether or not it is in the public interest to designate multiple federal and state ETCs in the study area of a rural telephone company (RTC). Promoting competitive entry is not enough justification to satisfy the public interest standard as set forth in Section 214(e). State commissions are routinely "rubber stamping" multiple ETC requests for federal support and conversely, as in the Utah case; a multiple ETC request for state support was carefully scrutinized and then denied. The rationale for approving multiple ETC requests for federal support – to facilitate competition. The rationale for denying state support – unwise expenditure of limited public funds. Congress did not envision that the funding source would dictate the public interest. Providing public support to a carrier other than the RTC is either a prudent expenditure of public funds or it is not.

UUI is recommending that two factors be considered. First, a cost/benefit analysis. What benefits will an additional ETC bring to consumers that they already do not have? What will be the costs of supporting multiple networks and will the benefits exceed the costs? The cost/benefit analysis needs to answer the question – are there sufficient incremental benefits to justify an additional ETC having access to universal service support? Will federal universal service support be efficiently utilized when the incumbent and the new entrant are both building and operating facilities to serve the same customers? The Joint Board recently acknowledged its responsibility to ensure that universal service support is efficiently used; "The Joint Board must ensure that the public interest is served by the efficient use of universal service support."[1]

Secondly, additional ETCs should be required, as is the rural telephone company, to be offering services throughout the study area of the rural telephone company prior to being designated as an additional ETC. The recent 5th Circuit decision reveals that the Commission likely made a mistake when it pre-empted South Dakota's decision to require Western Wireless to be providing service throughout the service area prior to being designated as an additional ETC. The Commission cannot prohibit the states from imposing any additional requirements when designating carriers as eligible for federal universal service support. Universal service and "competitive neutrality" are furthered when additional ETCs are required, as is the rural telephone company, to be offering services throughout the entire study area. This should foreclose new entrants from "cherry picking" the best customers and imposing inefficiencies, lost revenue, and stranded investments upon the RTC without making a commitment to providing consumers throughout the RTC's study area with a competitive choice.

The states and the Commission should give no weight to the presence of disaggregation zones when determining whether it is in the public interest to designate a multiple ETC. Disaggregation zones have no bearing on whether or not it is in the public interest to have the public help pay for and support duplicative networks and duplicative services.

[1] Cc: 96-45, Lifeline/Linkup Program, Order released April 2, 2003, para. 9

I. About United Utilities, Inc.

United Utilities, Inc. (UUI) is a local, Alaska native owned rural telephone company. UUI provides local exchange services to sixty (60) rural Alaskan communities. These communities cover in excess of 200,000 square miles and most are accessible only by air and boat. Most of the residents are native Alaskans who live a subsistence lifestyle. Local exchange services were established in all but three of these communities in the period from 1978 – 1984. UUI serves approximately 11,800 access lines. Bethel, a transportation and services support community for the Yukon Kuskokwim delta, is the largest community that UUI serves (approximately 3,600 access lines). The other fifty-nine (59) UUI communities range in size from approximately twenty (20) access lines in Birch Creek to approximately four hundred (400) access lines in Unalakleet. The average number of access lines in these fifty-nine (59) communities is approximately one hundred and thirty seven (137) access lines.

UUI provides state of the art local exchange services including digital switching, wireline, and wireless technologies. UUI also provides Internet services and connectivity for distance learning and telemedicine applications. UUI's affiliate, Unicom, provides cellular services and resells long distance services. UUI receives financing from the Rural Utility Services (RUS) to fund its capital projects. There are $22 million in loans outstanding to RUS. UUI has been designated as an eligible telecommunications carrier (ETC) and receives approximately seventy percent (70%) of its revenues from federal and state universal service funds and access charge revenues.

II. Universal Fund Supported Services

The typical UUI served community has a small school, a village health clinic manned by a village health aid, two stores with a limited selection of groceries and clothing, and a village public safety officer (VPSO). Unlike consumers living in or near urban areas, consumers do not have comparable local access to essential goods and services. To reach a doctor, conduct business, or to engage in other activities, residents rely on their telephone to be able to quickly and easily span great distances to communicate. Basic, universal service fund supported telecommunications services have been, and continue to be, essential to the public convenience and necessity.

III. Federal-State Board Request for Comments

The Federal-State Board has issued a public notice (PN) requesting comments on the Commission's rules relating to high-cost universal service support and the ETC designation process. UUI's comments will address the "Process for Designating ETCs".[2] Universal service support has been, and continues to be, essential for UUI to be able to build, operate, and maintain facilities and services that are needed to provide basic telecommunications services. The Telecommunications Act of 1996 (the Act) enables competitors to gain interconnection (Section 251) and compete with any incumbent

[2] Para. 33 – 35.

carrier, including UUI. The Act does not guarantee new market entrants with access to universal service funds (USF) to undermine and place at risk the universal services now being provided by rural telephone companies. The Act does require that a public interest finding be made by the state commission prior to designating an additional ETC (Section 102 (e)(2)) in the area served by a rural telephone company.

IV. Is "Due Care" Being Exercised in Deciding the Public Interest?

UUI is concerned that regulators are predisposed to "rubber stamping" competitive carriers requests for ETC status merely because the requests are coming from carriers who claim they need federal USF support to compete.

> ". . .it appears that the FCC is simply rubber-stamping the states' actions. Similarly, the states are endorsing the CETC designation requests without any independent public interest analysis."[3]

Is "Due Care" being exercised to protect the public interest? Is "Due Care" being exercised to ensure the sustainability of universal service and universal service funding? Are the states and the Commission thoroughly addressing whether or not it is in the "public interest" to expend federal USF funds on duplicative and nonessential services in high-cost areas where competition cannot be sustained? Here are quotes from several proceedings.

ALASKA

The Regulatory Commission of Alaska (RCA) granted General Communications Inc. (GCI) ETC status in the area served by Alaska Communications Systems (ACS). ACS is a rural telephone company. This is what the RCA said about GCI's ETC designation.

> "Denying GCI ETC status would be anticompetitive as only one carrier in the market would then receive the benefit of universal service funding. We therefore conclude that approval of GCI's ETC application is in the public interest."[4]

NORTH DAKOTA

The North Dakota Public Service Commission awarded Western Wireless Corporation ETC status in the study areas of eleven (11) rural telephone companies in North Dakota.

> "We find that access to high cost subsidies on an equal footing with incumbents may facilitate competition for universal services in rural, high-cost areas that would not otherwise receive the benefits of competition".[5]

---

[3] Application for Review . . .of Centurytel of Eagle, Inc., 12/17/02, p.7.
[4] RCA Docket U-01-11, Order No. 1, dated August 28, 2001, p. 23.

WYOMING

Western Wireless petitioned the FCC seeking ETC designation in the study areas of five rural telephone companies in Wyoming.

> " Designation of competitive ETCs promotes competition and benefits consumers in rural and high-cost areas . . . ."[6]

V. Quotes that Help to Explain the Need to Exercise "Due Care" When Assessing the Public Interest

Commissioners have questioned the use of universal service funds as a means of artificially creating "competition" in areas served by rural telephone companies. Artificial competition (using universal service support to incite entry) makes the incumbent carrier, who also receives universal service support, less efficient and less capable of delivering universal service. Should the demand to support multiple providers delivering identical services to the same population base continue to grow, the demand for universal service support will be dramatically greater than its prospective supply.

> ". . . I have some concerns with the Commission's policy . . . of using universal service support as a means of creating "competition" in high cost areas. I am hesitant to subsidize multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier. This policy may make it difficult for any one carrier to achieve the economies of scale necessary to serve all of the customers in a rural area, leading to inefficient and/or stranded investment and a ballooning universal services fund."[7]

> "Federal support is intended to promote universal service, not to subsidize artificial competition".[8]

> "The goal is to ensure that quality services are available at reasonable rates to everyone – even where competition and the marketplace fall short."[9]

> "The State Commissioners play a key role in determining if a competitor is eligible for universal service support. They need to take great care in doing this – greater care, in my opinion, than some have in the recent past. This designation is

5 North Dakota Public Service Commission Case No. PU-1564-88-428, Order on Remand (rel. Oct. 3, 2001).

6 FCC Docket 96-45, Memorandum Opinion and Order, 16 FCC Rcd 48, 55, para. 17 (2000).

7 MAG Plan Second Report and Order, Separate Statement of Commissioner Kevin J. Martin, 16 FCC Rcd 19770.

8 Remarks of Commissioner Jonathan S. Adelstein, OPASTCO, Washington, DC, "Meeting the Challenges of Rural Telecommunications", March 5, 2003

9 Ibid

critical to all carriers serving high-cost areas. And it's a key factor in allocating limited – and shrinking – universal service funds."[10]

"Universal service fund rules need to be modified to insure that the appropriate costs of the carrier providing service are recovered, but that the support intended to equalize the cost of service to consumers nationally is not being used to create artificially competitive markets".[11]

"The federal USF fund has grown substantially and there are increased demands on it from different claimants and historic claimants wanting more. But, there are limits on its growth, limits that very likely have been reached, and countervailing pressures from contributors to the fund (providers of interstate telecommunications services) to cap and reduce their obligations. Thus the demand for support is dramatically greater than its prospective supply from federal sources."[12]

VI. <u>What Factors Should be Considered in Determining Whether Designation of More than One ETC in a Rural Carrier's Study Area is in the Public Interest?</u>

1. <u>Cost versus Benefit</u> – prior to designating more than one ETC, the state commission should determine whether or not there would be sufficient incremental benefits that would justify the costs of supporting multiple ETCs.[13] If the benefits outweigh costs, then ETC status should be granted. If not, the request for multiple ETC status should be denied. When the Utah Public Service Commission denied ETC status for Western Wireless Corp, the Utah Supreme Court noted the cost/benefit analysis the Utah commission undertook as part of its deliberations:

> "The PSC found that it would not be in the public interest to designate WWC as an additional ETC in rural areas served by incumbent carriers. It found that designation of WWC as an ETC in these areas would increase demands on the state universal service fund without any offsetting benefits and consequently declined to designate WWE as an ETC in these areas."[14]

The Utah Supreme Court went on to point out that:

> ". . . the Order says that in the <u>absence</u> of corresponding public

---

[10] Ibid

[11] Separate Statement of Commissioner G. Nanette Thompson, Regulatory Commission of Alaska, cc: 96-45, Order Released February 25, 2003

[12] Report to Senate Appointees to the Task Force on Operations of the Regulatory Commission of Alaska, January 30, 2003, p.29.

[13] The cost/benefit analysis would recognize the Section 254(e) requirement that "federal support shall only be used for the provision, maintenance, and upgrading of facilities and services for which the support is intended."

[14] WWC Holding Co. Inc. v. Public Service Commission of Utah, et al, Case No. 20000835, 2002 UT 23 (fil. March 5, 2002).

benefits, increasing the burdens on the State (universal service) Fund is not in the public interest. . .Thus, the Order is not against competition per se, but, rather, merely recognizes that in some instances competition in rural areas by multiple ETCs receiving state universal service support may not be in the public interest."[15]

The Utah decision denying ETC status was motivated by the need to conserve and efficiently utilize limited state resources; whereas, other state decisions granting multiple ETC status were seeking federal resources i.e. federal universal service support. A "double standard" has evolved depending upon whose money is being spent – federal support or state support. The cost side of the cost versus benefit analysis needs to treat federal support (a cost) the same as state support (a cost). Unless the Commission provides guidelines to the states, it is likely that many states, especially high cost states that are net receivers of federal universal service support, will continue to "rubber stamp" ETC requests for federal universal service support for areas already served by an ETC.

The following quote is taken from the "Notice of Proposed Rulemaking" regarding the definition of services supported by universal service.

"Requirements that do not unduly prevent new entities from achieving ETC status may (emphasis added) serve the public interest and be competitively neutral because they may (emphasis added) increase competition, which may (emphasis added) lead to innovative new services and lower prices".[16]

The cost/benefit analysis would replace the "presumption" that additional ETCs should receive support with a deliberative effort to evaluate the "may" possibilities noted above and the public interest.

The Joint Board has expressed a concern for the sustainability of universal service funds.

"The Joint Board continues to believe that the definition of universal service must strike the appropriate balance between ensuring the availability of fundamental telecommunications services to all Americans and maintaining a federal universal service fund of sustainable size (emphasis added).[17]

"If advanced or high-speed services were added to the list of supported services, it could dramatically increase the financial burden placed on carriers and ultimately, consumers (emphasis added).[18]

---

[15] Ibid.
[16] Notice of Proposed Rulemaking, cc: 96-45, released February 25, 2003, para. 8.
[17] Ibid, para.1
[18] Ibid, para. 15.

"We also find the record unclear regarding the impact that the addition of soft dial tone and warm line services would have on the size of the universal service fund."[19]

The cost/benefit analysis would help to weed out additional ETC requests that would undermine universal service and jeopardize the sustainability of universal service funds. The cost/benefit analysis approach also advances Section 254's requirements that telecommunications services be offered at just, reasonable and affordable rates and that services in rural areas be reasonably comparable to services in urban areas.

Following are benefits that have been achieved when universal service support has been used by a single rural telephone company to serve everyone within a rural serving area.[20]

a. The current rural support mechanism has been in operation for almost 16 years, and has demonstrated the ability to provide sufficient universal service to allow reasonably comparable rates throughout the nation.

b. Since the current mechanism reimburses Rural Carriers for high costs they incur, it provides incentives for them to invest in the modernization of their telecommunications plant. It has enabled small carriers to provide new technologies at the same time those technologies were being introduced in urban areas.

2. Require that New ETCs offer Supported Services Throughout the Rural Telephone Company's Service Area

This is precisely what the Act requires; ". . . a common carrier designated as an eligible telecommunications carrier . .shall be eligible to receive universal service support . . and shall, throughout the service area for which the designation is received . . . offer the services that are supported by Federal universal service support mechanisms . . .".[21] Rural Telephone Companies (RTCs) are offering universal services to a finite population living within defined service area boundaries. RTCs are required to maintain ETC status, to continue to have facilities in place and to actually be offering universal service throughout the service area. New entrants seeking ETC status should also be required to have facilities in place and to actually be offering universal service throughout the same service area.

Universal service is placed at risk when another ETC is designated for a lesser service area than the service area the incumbent serves. All consumers residing within the incumbent's service area will not receive service from the new entrant (CETC). CETC designations below the study area level promotes "cream skimming" by enabling a competitor to pursue the most profitable and easy to serve customers while leaving the

---

[19] Ibid, para 29.
[20] Update and Status of the Rural Task Force (RTF) Recommendations and Other Plans Affecting Rural Carriers, July 11, 2001, Ben Johnson Associates
[21] Section 102 (e) the Act

incumbent with the more costly and more difficult customers to serve. In addition to losing universal service support, the incumbent carrier will also lose critical exchange access and local service revenues thus weakening, if not completely undermining, its ability to deliver universal service and to survive as an ongoing business.

UUI's manning, facilities, logistics, and systems are deployed so as to provide services to everyone living throughout the sixty (60) small rural communities that are within UUI's service area. UUI is able to gain economies of scale by having centralized support facilities, technicians, and systems that can cover multiple locations and accomplish many different tasks. Economies of scale are also realized by engineering switching and outside plant facilities to provide area wide service. A loss of customers will result in facilities having been overbuilt (stranded investments) and manpower and support systems being less efficient or not needed.

UUI's ability to secure capital is also jeopardized, as customers are lost. UUI is a RUS borrower. Under the terms of its RUS mortgage UUI is required to maintain a time interest earned ratio (TIER) of 1.5X. UUI estimates that should a competitor capture twelve percent (12%), or more, of UUI's revenue, then UUI will no longer be able to secure financing since UUI would be in violation of its RUS mortgage agreement.

It is not "competitively neutral" when a new entrant can pick and choose where and when it will serve within a rural telephone company's service area while the rural telephone company is required to be "actually" delivering services throughout the entire study area. Regulatory efforts to create advantages for new entrants in low population, high-cost rural areas, can only create artificial competition. Why would the Commission force consumers nationwide to pay for support that would be used merely to replicate existing services and to ultimately displace a rural telephone company?

VII. The South Dakota Public Utilities Commission (SDC) Was Correct – Western Wireless Should Have Been Required to Provide Service Throughout the Service Area Prior to Being Designated as an ETC

The Commission has granted Western Wireless Corporation's petition for preemption of an order of the South Dakota Public Utilities Commission (SDC). The SDC order required Western Wireless to provide service throughout the service area prior to being designated as an ETC. Following are quotes from the FCC's order.

> "A new entrant faces a substantial barrier to entry if the incumbent local exchange carrier (LEC) is receiving universal service support that is not available to the new entrant for serving customers in high-cost areas. We believe that requiring a prospective new entrant to provide service throughout a service area before receiving ETC status has the effect of prohibiting competitive entry in those areas where universal service support is essential to the provision of affordable telecommunications service and is available to

the incumbent LEC. Such a requirement would deprive consumers in high-cost areas of the benefits of competition by insulating the incumbent LEC from competition."[22]

". . we find that a telecommunications carrier's inability to demonstrate that it can provide ubiquitous service at the time of its request for designation as an ETC should not preclude its designation as an ETC."[23]

"Although Congress recognized that state commissions are uniquely suited to make ETC determinations, we do not believe that Congress intended to grant to the states the authority to adopt eligibility requirements that have the effect of prohibiting the provision of service in high-cost areas by non-incumbent carriers."[24]

Commissioner Harold Furchtgott-Roth issued a dissenting statement to the majorities Western Wireless decision. Commissioner Furchgott-Roth said:

"It is impossible to understand how failing to assign a new carrier eligible telecommunications carrier status could "prohibited" or had the "effect of prohibiting" it from providing service in South Dakota. The Declaratory Ruling asserts that " (a) new entrant faces a substantial barrier to entry if the incumbent local exchange carrier (LEC) is receiving universal service support that is not available to the new entrant for serving customers in high-cost areas." Amazingly, however, the order leaves out the fact that in the non-rural areas of South Dakota, the incumbent does not receive federal universal support for any of the non-rural lines it serves. In other words – and contrary to the linchpin of the Commission's reasoning here – designation as an ETC confers no benefit at all upon the non-rural incumbent carrier that has received that status, and there is no factual basis for concluding that another carrier's lack of ETC status could have the effect of prohibiting the carrier from offering service."[25]

"To be sure, incumbent carriers that serve rural areas in South Dakota do receive some federal universal service support. But whether to designate more than one carrier as an ETC in these rural areas lies entirely within the South Dakota PUC's discretion, and I do not understand the majority to question that principle, which is dictated by the 1996 Act and our precedent. A state commission remains free to decline to grant an applicant ETC status for rural areas, based on public interest considerations, and this order can have no effect on its exercise of that discretion."[26]

[22] FCC Docket 96-45, Order released August 10, 2000, para. 12.
[23] Ibid, para. 17.
[24] Ibid, para. 29.
[25] Ibid, Dissenting Statement of Commissioner Harold Furchtgott-Roth, p. 2.
[26] Ibid.

The Commission would not have pre-empted South Dakota had the recent Fifth Circuit decision been available.

> "The first sentence requires state commissions to designate at least one common carrier as eligible, but that carrier must still meet the eligibility requirements in Section 214(e)(1). The second sentence then confers discretion on the states to designate more than one carrier in rural areas, while requiring them to designate eligible carrier in non-rural areas consistent with the "public interest" requirement. Nothing in the statute, under this reading of the plain language speaks at all to whether the FCC may prevent state commissions from imposing additional criteria on eligible carriers. Thus, the FCC erred in prohibiting the states from imposing additional eligibility requirements on carriers otherwise eligible to receive federal universal service support. The plain language of the statute speaks to the question of how many carriers a state commission may designate, but <u>nothing in the subsection prohibits the states from imposing their own eligibility requirements (emphasis added).</u> This reading makes sense in light of the states' historical role in ensuring service quality standards for local service. Therefore, we reverse that portion of the Order prohibiting the states from imposing any additional requirements when designating carriers as eligible for federal universal service support."[27]

This proceeding will provide the Commission with an opportunity to reassess its thinking on how to protect and how to further universal service. The Commission should note that the Federal State Joint Board has recommended that reduced requirements for a subset of ETCs <u>not</u> be approved.

> "Thus, because we believe reduced requirements for a subset of ETCs may be contrary to the intent of section 214 and may not be competitively neutral, we do not recommend that the Commission adopt RUS and Rural Cellular Association's proposals."[28]

Permissive federal guidelines would be helpful to guide state deliberations when considering multiple ETC requests. Contrary to the Commission's past thinking, federal universal service funds are not capital venture funds – to receive federal support new entrants need to bring measurable benefits to the table (cost/benefit analysis) and compete on a competitively neutral basis (actually be providing eligible services throughout the service area of the rural telephone company).

VIII. <u>No Weight Should be Given to the Presence of Disaggregation Zones When Determining Whether the Designation of a Competitive ETC Below the Study Area Level Is in the Public Interest</u>

The Commission inquires; "In light of the Commission's finding that disaggregation zones encourage efficient market entry, what weight should states and the

[27] Texas Office of Public Utility Counsel v. FCC. 183 F.3d 393, 418 (5th Cir. 1999).
[28] Ibid para 59.

Commission place on the presence of such zones when determining whether the designation of a competitive ETC below the study area level is in the public interest."[29]

Disaggregation of federal support helps to "ensure that support is distributed in a manner that ensures that the per-line level of support is more closely associated with the cost of providing service"[30] when more than one ETC exists. The fact that federal support can be disaggregated has nothing to do with the issue of whether it is in the public interest to have more than a single ETC drawing universal service support to deliver services that are already being provided by the rural telephone company.

The issue is whether or not the designation of a multiple ETC is in the public interest – (1) do the benefits of such designation exceed the costs of supporting multiple providers; and, (2) will the CETC and the incumbent be competing on a "competitively neutral basis" i.e. will both carriers actually be providing universal services throughout the rural company's study area.

The states and the Commission should give no weight to the presence of disaggregration zones when determining whether it is in the public interest to designate a multiple ETC.[31]

IX. Summary

The Commission should adopt permissive guidelines for the states to use when considering multiple ETC requests. These guidelines should include a cost/benefit analysis and a requirement that, to receive CETC status and access to universal service support, the CETC needs to actually be providing service throughout the study area of the rural telephone company prior to being designated as an additional ETC.

The Commission should inform the states that it does not believe that any weight should be given to the presence of disaggregation zones when determining whether the designation of a competitive ETC below the study is in the public interest.

Respectfully submitted,

Steve Hamlen
President

---

[29] para. 35.
[30] Ibid.
[31] UUI opposes any attempt to disaggregate its study area and refers the Commission to Section 214(e)(5), Service Area Defined.